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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN HENRY MORGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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65 pp

QUESTIONS PRESENTED

1. Whether law enforcement officers who have probable cause to believe that a suspect committed a felony must obtain a warrant before inducing the suspect to leave his house so that they may arrest him, when the officers effect the arrest without entering the house.

2. Whether, assuming that officers violate the Fourth Amendment when they summon a suspect from his house without a warrant, a weapon that the suspect carries with him when he leaves the house should be treated as a fruit of the improper arrest.

3. Whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in the reasonable belief that the warrantless arrest of a felony suspect did not violate the Fourth Amendment.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 743 F.2d 1158. The written (App., *infra*, 23a-28a) and oral (App., *infra*, 29a-30a) opinions of the district court are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 33a-34a) was entered on September 13, 1984. A petition for rehearing was denied on November 27, 1984 (App., *infra*, 31a-32a). On January 17, 1985,

Justice O'Connor extended the time in which to file a petition for a writ of certiorari to February 25, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Respondent was indicted in the United States District Court for the Eastern District of Tennessee on a single count of possessing an automatic weapon that had not been registered to him, in violation of 26 U.S.C. 5861(d) and 5871 (App., *infra*, 1a-2a, 23a; C.A. App. 2). The district court suppressed the weapon on the ground that it had been seized in violation of the Fourth Amendment (App., *infra*, 23a-30a). The government appealed under 18 U.S.C. 3731, and the court of appeals affirmed (*id.* at 1a-22a).

1. Sheriff Reynolds and Deputy Sheriff Bells of Morgan County, Tennessee, went to a public park to investigate reports of shooting. As they approached the park in an unmarked car, they recognized the sound of automatic weapons being fired. Upon arriving at the park, they saw respondent and four or five other individuals standing near the open trunk of a blue Cadillac. App., *infra*, 2a, 24a; C.A. App. 34, 41, 58, 76. When the group recognized the officers, respondent expressed surprise, saying "[you] never know what the law is going to be driving" (C.A. App. 34), and another member of the group dropped a weapon with a folding stock—characteristic of automatic weapons—into the trunk. When confronted by the officers, the group agreed to leave the park. App., *infra*, 2a, 24a-25a; C.A. App. 34, 41-42.

The officers then drove about 200 yards away from the group and, after conferring, decided to investi-

gate further. When they again approached the scene, one member of the group quickly closed the trunk of the Cadillac in a fashion that led Sheriff Reynolds to conclude that he was attempting to conceal its contents from the officers. App., *infra*, 2a; C.A. App. 34-35. Sheriff Reynolds then began to write down the license plate number of the Cadillac, but before he finished doing so he was approached by a bystander who made the following statement to him:

> If you get out of the car and attempt to arrest these people they will shoot you. They have done made the comment that they will kill any law that tries to arrest them. The best thing you ought to do is to get out of here and go get some help.

App., *infra*, 3a. The bystander also told the officers that the trunk of the Cadillac was filled with machine guns, pistols, and shotguns, and that every member of respondent's group was armed. *Ibid.*; C.A. App. 35-36.

The officers immediately left the park, without pausing even to finish recording the license plate number of the Cadillac, and called for additional help. When the help arrived the officers returned to the scene, but respondent's group was no longer there. The officers then blocked off nearby roads and broadcast an alert for a blue Cadillac bearing an out-of-state license plate with a number that began with "95." The alert warned that the occupants of the car should be considered armed and dangerous. App., *infra*, 3a; C.A. App. 36-37, 48-50.

Shortly thereafter, Officer Isham of the City of Harriman Police Department, who had heard the alert, saw the Cadillac and followed it to the home of respondent's mother. He observed several people

leave the car and carry a large number of weapons into the house. When Officer Isham reported his observations, his superior, Assistant Chief Alcorn, instructed him that it would be unsafe to proceed further without other officers present. The officers then called for help, and several officers, including Sheriff Reynolds and Deputy Sheriff Bells, arrived on the scene. Reynolds and Bells identified the blue Cadillac as the car they had seen at the park. App., *infra*, 3a; C.A. App. 30-31, 50, 60, 61.

The officers then met briefly in the parking lot of a nearby restaurant to coordinate assignments. Chief Alcorn drove his car into the driveway of the house, behind the Cadillac; the eight other officers surrounded the house. At this point, slightly more than one hour had elapsed since the initial encounter in the park. Chief Alcorn, using a public address system, identified himself as a police officer and summoned respondent from the house. App., *infra*, 4a; C.A. App. 50-53, 57. According to the testimony of one of respondent's companions inside the house, respondent said: "It is the cops. What should we do?" (C.A. App. 80). When Chief Alcorn received no response, he repeated the summons. Respondent then appeared at the door of the house holding what the officers recognized as an automatic pistol. Chief Alcorn ordered respondent to place the weapon down, but instead respondent raised it, with his finger on the trigger guard. When Chief Alcorn repeated the order, respondent placed the weapon "just inside of the doorway" of the house. C.A. App. 54; see *id.* at 37-38, 53-54; App., *infra*, 4a, 25a.

Chief Alcorn then ordered respondent to step forward with his hands in view. Respondent instead reached into his right rear pocket. When Chief Al-

corn ordered him to move his hand away, respondent began to comply but then returned his hand to his pocket. An officer fired warning shots; respondent then moved his hand away and complied with an order to lie on the ground. The officers placed respondent under arrest, frisked him, and found a loaded pistol in his right rear pocket. App., *infra*, 4a, 25a; C.A. App. 37-38, 51-55.

Chief Alcorn then ordered the other occupants from the house; after several persons emerged, three officers entered the house briefly to see if there were other potentially dangerous occupants. On his way into the house, Chief Alcorn seized the weapon respondent had placed inside the doorway. This weapon, too, was fully loaded. App., *infra*, 4a, 25a; C.A. App. 38-39, 55-56. Respondent was indicted for possessing this weapon.

Inside the house, the officers found 12 or 13 other weapons scattered about the front room. All of them were loaded. The officers also found some marijuana and drug paraphernalia. C.A. App. 39.

2. The district court ordered that all of the evidence discovered at the house be suppressed. App., *infra*, 23a-30a. It ruled that the officers had probable cause to suspect respondent of a crime when they surrounded the house. *Id.* at 27a-28a, 30a. But the district court faulted the officers for not obtaining a warrant. The court stated that it did "not find a prior justification for Officer Alcorn's entry onto the property without a search or arrest warrant" (*id.* at 26a) and ordered the evidence suppressed for the following reasons (*id.* at 27a-28a):

> For officers to enter a home without a search warrant, the circumstances must be extraordinary. In the opinion of the Court, the circum-

> stances known by the officers should have been sufficient to create probable cause for the issuance of a search warrant. We find, however, that these circumstances did not justify the warrantless entry onto the property and the subsequent search of the house in this case. Failure to obtain a warrant prevents all of the evidence obtained during the warrantless entry from being competent at the trial on the merits.

The government moved for reconsideration, abandoning the effort to obtain admission of the evidence found inside the house but urging that the automatic weapon respondent had pointed at the officers, and was indicted for possessing, should be admitted into evidence (C.A. App. 103-109).[1] The district court denied the motion without opinion (*id.* at 119).

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[1] We believe the evidence found inside the house should also not have been suppressed. The officers, who knew that there were a large number of weapons in the house, had no way of knowing that no one was still hiding in the house and had ample reason to believe that any persons still inside the house could pose a threat to their safety. In these circumstances, as the courts of appeals have consistently ruled, the officers were entitled to make a search of the house for other persons in order to protect their own safety. See, *e.g.*, *United States* v. *Martino*, 664 F.2d 860, 869-870 (2d Cir. 1981), cert. denied, 458 U.S. 1110 (1982); *United States* v. *Wiga*, 662 F.2d 1325, 1331 (9th Cir. 1981), cert. denied, 456 U.S. 918 (1982); *United States* v. *Vasquez*, 638 F.2d 507, 530-532 (2d Cir. 1980), cert. denied, 454 U.S. 975 (1981); *United States* v. *Gardner*, 627 F.2d 906, 909-911 (9th Cir. 1980); *United States* v. *Baker*, 577 F.2d 1147, 1152 (4th Cir.), cert. denied, 439 U.S. 850 (1978); *United States* v. *Bowdach*, 561 F.2d 1160, 1168-1169 (5th Cir. 1977); *McGeehan* v. *Wainwright*, 526 F.2d 397, 399-400 (5th Cir.), cert. denied, 425 U.S. 997 (1976); *United States* v. *Sellers*, 520 F.2d 1281, 1284 (4th Cir. 1975), cert. denied, 429 U.S. 1075 (1977); *United States*

3. The court of appeals affirmed, ruling that respondent "was illegally arrested when the police surrounded the * * * home and utilized coercive tactics and physical restraints which induced his presence at the door" (App., *infra*, 21a). The court stated that "because this conduct was not justified by a valid warrant or exigent circumstances, the subsequent police seizure of the gun * * * was illegal[]" (*ibid.*).

The court of appeals noted (App., *infra*, 5a) that in *Payton* v. *New York*, 445 U.S. 573 (1980), this Court ruled that, in the absence of exigent circumstances, law enforcement officers must obtain a warrant before entering a suspect's home to arrest him. The court of appeals acknowledged that the officers "may have" had probable cause to arrest respondent when they surrounded his mother's residence (App., *infra*, 10a-11a) but ruled that "as soon as the police surrounded the * * * home, * * * the arrest violated *Payton* because no warrant had been secured" (*id.* at 12a).[2] The court of appeals expressly rejected the

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v. *Smith*, 515 F.2d 1028, 1031 (5th Cir. 1975), cert. denied, 424 U.S. 917 (1976). The cache of guns was seen in plain view during the protective sweep and was therefore lawfully seized.

[2] The court of appeals found that there were no exigent circumstances because the officers were not in "hot pursuit" of respondent (App., *infra*, 7a); because respondent and his confederates did not "represent[] an immediate threat to the arresting officers or the public" (*id.* at 8a); and because "immediate police action" was not needed "to prevent the destruction of vital evidence or thwart the escape of known criminals" (*id.* at 10a). In reaching its conclusion that there were no exigent circumstances, the court of appeals em-

government's argument that no warrant was required to arrest respondent because the officers did not enter the house to make the arrest; instead, the court reasoned as follows (*id.* at 17a):

> Although there was no direct police entry into [respondent's mother's] home prior to [respondent's] arrest, the constructive entry accomplished the same thing, namely, the arrest of [respondent]. Thus, the warrantless arrest of [respondent], as he stood within the door of a private home, after emerging in response to coercive police conduct, violated [respondent's] fourth amendment rights.

The court then ruled that the automatic weapon was correctly suppressed. The court reasoned that "[b]ecause the initial intrusion by the police was illegal, any evidence or contraband discovered as a result of that intrusion was illegally obtained" (App., *infra*, 20a).

Judge Wellford concurred separately. He stated that "under the circumstances known to the police officers concerning the very recent use and/or possession of suspected illegal weapons by [respondent] (and others) in a public park, there was no need for a warrant to enter on [respondent's] mother's property to investigate and to attempt to question [respondent] about his knowledge and/or involvement in the episode" (App., *infra*, 22a). Judge Wellford also remarked that he "doubt[ed]" that the warrant requirement of *Payton* was applicable "because the

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phasized that the officers had time to meet to plan their strategy for apprehending respondent (see *id.* at 7a-8a, 10a).

officers did not enter into the mother's home to arrest respondent without a warrant" (*ibid.*). But Judge Wellford nevertheless determined that the officers acted unlawfully because respondent "was, in effect, compelled to leave his mother's house by coercive police conduct not justified by exigent circumstances at the time, bringing about an apparently intended warrantless arrest" (*ibid.*). Judge Wellford concluded that the automatic weapon was correctly suppressed because its seizure "was part and parcel of the improper warrantless arrest situation" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The court of appeals erred in concluding that *Payton* v. *New York*, 445 U.S. 573 (1980), required the officers to obtain a warrant before they summoned respondent from the house. Under *Payton*, officers must obtain a warrant before arresting a suspect in a house *because* the arrest involves a search of the house. Here, the officers' arrest of respondent did not involve a search of the house. The court of appeals therefore should have applied the well-established principle governing arrestsoutside the home—that a warrantless arrest is lawful if based on probable cause—and upheld the officers' actions.

This is perhaps the single most important unresolved issue of arrest law; it is of recurring practical significance; and it is one on which the lower courts are in disarray. Law enforcement officers frequently make arrests by inducing suspects to leave a house—either by a direct order, as here, or by a ruse—or simply by knocking on the door and apprehending the suspect if he answers. To require officers to obtain warrants in all of these very common situations will impose substantial and unnecessary costs on the ad-

ministration of criminal justice without furthering the purposes that led the Court to conclude in *Payton* that some form of warrant is required to search a home for the person of a suspect.

Irrespective of whether the arrest was lawful, the court of appeals erred in ordering the suppression of the weapon. Respondent's act of carrying the weapon to the door and displaying it to the officers was an independent intervening act of free will that purged the taint of any police illegality. Finally, if the Court disagrees with our submission and concludes that the arrest was unlawful and the weapon was a fruit of the arrest, the weapon should still be allowed into evidence because this is an appropriate case in which to apply a "reasonable mistake" exception to the Fourth Amendment exclusionary rule.

1. "In *United States* v. *Watson*, 423 U.S. 411 (1976), [the Court] held that the warrantless arrest of an individual in a public place upon probable cause [does] not violate the Fourth Amendment." *United States* v. *Santana*, 427 U.S. 38, 42 (1976). This rule has deep roots in history (see *Watson*, 423 U.S. at 418-422), and at least until *Payton*, the Court "ha[d] never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." *Gerstein* v. *Pugh*, 420 U.S. 103, 113 (1975).

The courts below concluded that when the police surrounded respondent's mother's house and summoned him outside, they effectively arrested him for purposes of the Fourth Amendment. Although this conclusion is not obviously correct, we do not dispute it here.[3] The district court found, and the court of

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[3] The officers' actions also did not exceed the scope of a permissible *Terry* stop. *Terry* v. *Ohio*, 392 U.S. 1 (1968); see, *e.g.*, *United States* v. *Hensley*, No. 83-1330 (Jan. 8, 1985),

appeals assumed, that at the time the officers took this action, they had probable cause to believe that respondent had committed at least the felony of unlawfully possessing automatic weapons.[4] Never-

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slip op. 5-8; *Florida* v. *Rodriguez*, No. 83-1367 (Nov. 13, 1984), slip op. 5; *Florida* v. *Royer*, 460 U.S. 491, 498 (1983) (opinion of White, J.); *United States* v. *Mendenhall*, 446 U.S. 544, 560 (1980) (Powell, J., concurring); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-882 (1975). It was manifestly reasonable for the officers to respond to the events at the park not by shrugging their shoulders but by attempting to pursue their investigation by speaking with respondent. If the officers had knocked on the door of the house and, when respondent appeared, detained him while they questioned him briefly, there would be no question that their actions would not have exceeded the bounds of a lawful *Terry* stop. But the officers had abundant reason to fear that such an approach to a house, the occupants of which were armed and had reportedly threatened to kill law enforcement officers, would jeopardize their safety. In these circumstances, it was surely reasonable for them to carry out the *Terry* stop by remaining at a distance while they summoned respondent from the house. See, *e.g.*, *United States* v. *Merritt*, 695 F.2d 1263, 1272-1275 (10th Cir. 1982); *United States* v. *White*, 648 F.2d 29, 36-40 (D.C. Cir. 1981); *United States* v. *Williams*, 604 F.2d 1102, 1109 (8th Cir. 1979); *United States* v. *Coades*, 549 F.2d 1303 (9th Cir. 1977). Of course, when they did so, respondent appeared brandishing an automatic weapon, thus giving the officers undoubted probable cause to arrest him.

[4] It is, in fact, entirely clear that the officers had probable cause at the time they surrounded the house. The officers had heard automatic weapons fire from the park; they saw a member of respondent's group holding a weapon with a folding stock; they saw members of the group acting furtively, in a fashion that suggested a desire to conceal something from the officers; and they were told by a bystander that the car contained automatic weapons. Cf. *Adams* v. *Williams*, 407 U.S. 143, 148-149 (1972).

theless, the courts below ruled that the arrest of respondent violated the Fourth Amendment. They reached this conclusion because they read *Payton* v. *New York*, *supra*, to stand for the proposition that a warrant is required to arrest a person, even on probable cause, "while he [is] present inside a private home" (App., *infra*, 17a).

This is an important and fundamental misunderstanding of *Payton*. The explicit holding of *Payton* was that "the Fourth Amendment * * * prohibits the police from making a warrantless and nonconsensual *entry into a suspect's home* in order to make a routine felony arrest" (445 U.S. at 576; emphasis added). The language and logic of the *Payton* opinion itself, and a correct analysis of the relevant Fourth Amendment interests, make it clear that the Court in *Payton* meant what it said: law enforcement officers need a warrant to arrest a suspect only if they enter a home in the course of doing so. Since the officers in this case did not enter the house in the course of arresting respondent, they were not required to have a warrant, and the courts below erred in concluding that the arrest violated the Fourth Amendment.

a. A search of a house for contraband or evidence of a crime cannot, of course, be justified by probable cause alone; unless there are exigent circumstances, the officers must ordinarily obtain a warrant. See, *e.g.*, *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948). *Payton* rests on the principle that a search of a house for a person is sufficiently similar to a search for evidence to make a warrant necessary in both situations. As the Court explained in *Payton*, officers must obtain a warrant before entering a home to arrest a suspect because "it is inherent in such an entry that a search for the suspect may be required

before he can be apprehended." 445 U.S. at 588 (footnote omitted). See also *Steagald* v. *United States*, 451 U.S. 204, 211 (1981). Thus, in the situation presented by *Payton*, the Fourth Amendment is violated not by the warrantless *arrest* of the suspect but by the warrantless *search* of the house that occurs in the course of effecting the arrest. The Court's reasoning in *Payton* makes this point unmistakably clear (445 U.S. at 589-590):

> [T]he critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home * * *. [T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

It follows that *Payton* did not require the officers to obtain a warrant before they summoned respondent from his mother's house. The officers' actions in arresting respondent did not in any sense constitute a search of the house; the officers did not see the inside of the house until after respondent was arrested. In the language of *Payton*, the officers did not "breach the entrance" of the house, invade "the unambiguous physical dimensions of an individual's home," or violate the precept that the "threshold may not reasonably be crossed without a warrant."

It is true, of course, that the officers' actions implicated interests protected by the Fourth Amend-

ment; we do not dispute that those actions amounted to a seizure and that under the Fourth Amendment a seizure must be reasonable. But the holding of *Watson* is precisely that a seizure is reasonable even if it is conducted without a warrant, so long as it is based on probable cause and does not involve a search of a residence. It is also true that the officers' actions disturbed respondent's repose in the house; it was apparently this aspect of the arrest that caused the court of appeals to rule that a warrant was required. But the warrant requirement applies to *searches*, not to all actions that might be said to intrude upon the sanctity of the home in some sense. " '[T]he *physical entry* of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Welsh* v. *Wisconsin*, No. 82-5466 (May 15, 1984), slip op. 7-8, quoting *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972) (emphasis added). Cf. *Lewis* v. *United States*, 385 U.S. 206 (1966); *Payton*, 445 U.S. at 585 (declining to endorse the broad language of *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)).[5]

The court of appeals, and Judge Wellford in particular, also attached considerable importance to the officers' use of what they termed "coercive activity" (App., *infra*, 4a; *id.* at 17a, 21a, 22a). The significance of this factor is not entirely clear, since, by their very nature, arrests ordinarily entail coercive conduct. We note that the officers' supposed "coercion" consisted simply in summoning respondent from

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[5] Indeed, the home was not even respondent's; it was his mother's home, which he was visiting for a brief period. See C.A. App. 24-25. It is therefore not entirely clear that respondent is even entitled to assert a substantial interest in repose in the home.

the house while maintaining a safe distance; there is no evidence that the officers even displayed weapons until respondent pointed a weapon at them. But in any event, the Fourth Amendment requirement is one of reasonableness: the officers' tactics, coercive or not, did not violate the Fourth Amendment unless they were unreasonable. The officers were approaching a house that they knew to contain large numbers of weapons, including at least one automatic weapon, and to be inhabited by a group of persons who had allegedly threatened to shoot any law enforcement officers who attempted to arrest them. In these circumstances, their actions can hardly be described as unreasonable; indeed, it would have been foolhardly for the officers to have proceeded in any other way.

b. The question whether law enforcement officers must obtain a warrant before inducing a suspect to come to the threshold or leave his house so that they may arrest him is one of great practical significance, and its resolution is likely to have a substantial effect on police practices. Law enforcement officers who believe they are dealing with armed and dangerous suspects who are inside a building will often approach the building in much the way the officers in this case approached respondent. Officers may also attempt to induce a suspect to leave his home by employing a ruse; or they may simply knock on the door and arrest the suspect if he answers. The last method is particularly likely to be used in the substantial number of cases in which the crime is less serious and the suspect is thought likely to submit to the arrest peacefully upon answering the door.

In each of these situations, the arrest can be effected without a search of the residence, and a warrant authorizing a search should therefore not be re-

quired. But if *Payton* is interpreted as a holding that law enforcement officers must have a warrant before they take any steps to arrest a person who is inside his home at the time, the rule of *Watson*—which has been thought to be the general rule governing arrests—will not apply to these extremely common situations.[6]

The lower court decisions that have considered the lawfulness of arrests effected by inducing a suspect to leave a house reflect no coherent understanding of the relationship between *Payton* and *Watson*. For example, the Ninth Circuit appears to allow an officer who has probable cause to knock on a suspect's door and arrest him without a warrant if he answers, unless the officer gives a false identity when he knocks. Compare *United States* v. *Whitten*, 706 F.2d 1000, 1015 (1983), and *United States* v. *Botero*, 589 F.2d 430 (1978), cert. denied, 441 U.S. 944 (1979), with *United States* v. *Johnson*, 626 F.2d 753, 756-757 (1980), aff'd on other grounds, 457 U.S. 537 (1982). The Tenth Circuit has upheld a warrantless arrest made when a suspect answered a knock on the door of his motel room. *United States* v. *Herring*, 582 F.2d 535, 543 (1978). The Fifth Circuit has upheld the warrantless arrest of a suspect who appeared at his

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[6] We of course recognize that an arrest is a serious intrusion on individual liberty and is regulated by the Fourth Amendment. But the balance that has been struck by Anglo-American law for centuries, and that was confirmed by this Court in *Watson*, is that felony arrests are reasonable if based upon probable cause, and that no warrant is required unless, as in *Payton*, the arrest is accomplished by means of a search of private premises. See also 2 W. LaFave, *Search and Seizure* 231 (1978) (warning of the trivialization of the warrant requirement if warrants are routinely required for arrests).

door when he saw officers approaching. *United States* v. *Mason*, 661 F.2d 45, 47 (1981). Recently, however, the Washington Supreme Court relied on the court of appeals' decision in the present case to hold that, under *Payton*, police officers must have a warrant to arrest a suspect standing in the doorway of his house even if the officers do not cross the threshold. *Washington* v. *Holeman*, No. 50606-0 (Jan. 10, 1985), slip op. 3-4 (summarized at 36 Crim. L. Rep. (BNA) 2324 (1985)).

2. The court of appeals appears to have recognized that if the arrest of respondent was lawful, the automatic weapon respondent brought with him to the door was lawfully seized. For example, the court indicated that the weapon was "seized incident to [respondent's] arrest" (App., *infra*, 18a). And in explaining why the weapon was not properly seized even though it was obviously incriminating evidence in plain view, the court said only that the officers "were not 'lawfully engaged' in legitimate police activities at the moment the object in question came into 'plain view'" (*id.* at 19a). Thus, the basis of the court of appeals' determination that the weapon was inadmissible was simply its conclusion that the weapon was "discovered as a result of" the supposedly illegal arrest (*id.* at 20a).[7]

[7] Because we understand the court of appeals to have ordered the suppression of the weapon solely on the ground that it was the fruit of an unlawful arrest, we have not separately presented the question whether the weapon would be admissible if the arrest were held to be lawful. In fact, assuming the lawfulness of the arrest, the weapon would be admissible on any one of three independently sufficient rationales.

First, the seizure of the weapon did not involve a search. The weapon was clearly visible just inside the threshold of the house; its seizure did not place the officers in a position to observe anything that was kept private inside the house. An

While it may be true that the weapon would not have been seized if the officers had not arrested respondent, it does not follow—even assuming, contrary to our submission, that the arrest was illegal—that the weapon was correctly suppressed. This Court has repeatedly held that evidence is not to be excluded merely because "it would not have come to light but

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object that an officer can see without conducting a search may be seized on probable cause without a warrant. See, *e.g.*, *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 6; *Texas* v. *Brown*, 460 U.S. 730, 738-739 (1983) (plurality opinion); *id.* at 748 (opinion of Stevens, J.); *Payton*, 445 U.S. at 587; *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977). The officers had probable cause to seize the weapon because they recognized it to be an automatic weapon. *United States* v. *Santana*, *supra*, held that a *person* standing on the threshold of a residence may be seized on probable cause without a warrant; there is no reason for a different rule to apply to the seizure of contraband.

Second, even if the act of reaching just inside the threshold is thought to constitute a search, exigent circumstances amply justified the officers in taking this action. Respondent's mother's house was in a residential neighborhood (C.A. App. 58). Nine officers were attempting to maintain control of at least six recently arrested suspects, and the officers did not know how many other suspects might still be in the house. The officers did know, however, that there were numerous other dangerous weapons in the house. The officers had been warned that respondent's group had threatened to kill law enforcement officers, and respondent had resisted arrest. In these circumstances, the officers were plainly not required to leave an automatic weapon lying on the threshold of the house while a warrant was sought.

Third, assuming again that the act of reaching just over the threshold involved a search, the weapon appears to have been close enough to respondent to make such an action a lawful search incident to arrest. This is true even though respondent had been subdued. See *New York* v. *Belton*, 453 U.S. 454 (1981).

for the illegal actions of the police." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). See, *e.g.*, *Rawlings* v. *Kentucky*, 448 U.S. 98, 106 (1980); *Brown* v. *Illinois*, 422 U.S. 590, 603 (1975). In particular, evidence is not to be suppressed if it is the product of "an act of free will [that] * * * purge[s] the primary taint" (*Wong Sun*, 371 U.S. at 486). Respondent's decision to resist arrest by appearing at the door with an illegal weapon was such a deliberate act.

The admissibility of evidence obtained following an illegal detention should, of course, be determined by reference to the objectives of the Fourth Amendment exclusionary rule. See *Brown*, 422 U.S. at 601-603. "Whether the exclusionary sanction is appropriately imposed in a particular case * * * must be resolved by weighing the costs and benefits of preventing the use" of the evidence in issue. *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 7. The costs of allowing a suspect to escape criminal liability even though he responds to a police summons by appearing with a dangerous illegal weapon are obviously great. At the same time, there can be no suggestion that the officers deliberately conducted an illegal arrest of respondent in the hope of inducing him to appear with an illegal weapon. Compare *Brown*, 422 U.S. at 605. In these circumstances, the court of appeals plainly erred in concluding that the balance of interests favored suppression.[8]

3. We accordingly submit that the arrest of respondent was lawful and that, even if it was not, the

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[8] Indeed, it is particularly ironic that the rule of *Payton*—which is designed to protect the security of the home against physical intrusions—should be invoked as the basis for suppressing a weapon that the officers obtained not because they entered the home but because respondent voluntarily carried it outside the home.

seizure of respondent's weapon was not a suppressible fruit of any illegality. But if the Court were to disagree with us and conclude that the seizure of the weapon violated the Fourth Amendment, the evidence should nonetheless be admitted because a reasonably well-trained police officer would not have known that the seizure of the weapon was unconstitutional.

a. Last Term, in *United States* v. *Leon*, No. 82-1771 (July 5, 1984), the Court held that the Fourth Amendment exclusionary rule should be modified so as to permit the introduction of evidence seized by officers reasonably relying on a search warrant, even if the warrant is ultimately found to have been invalid. In the same Term, the Court granted certiorari in *Colorado* v. *Quintero*, No. 82-1711 (June 27, 1983), to consider whether the Fourth Amendment exclusionary rule should be modified so as to permit the admission of evidence seized as the result of a search incident to a warrantless felony arrest when the arresting officer reasonably but mistakenly believed that the arrest was based on probable cause. On December 12, 1983, the writ of certiorari in *Quintero* was dismissed as moot because the defendant had died.

In the present case, the government contended in the court of appeals—and we demonstrate below—that even if the officers' actions are ultimately determined to have violated the Fourth Amendment, the weapon should nonetheless be admitted because the Fourth Amendment principles that the officers transgressed were by no means clearly established at the time, and reasonable arguments can be made in defense of the officers' actions. The court of appeals rejected this contention, distinguishing *Leon* on the ground that in that case the officers had obtained a warrant, while the officers in this case had not (App.,

infra, 13a-14a). Accordingly, should this Court determine that the officers' actions violated the Fourth Amendment, this would be a suitable case in which to consider whether the "reasonable mistake" exception to the exclusionary rule established in *Leon* should apply to warrantless searches or seizures as well.

We submit, however, that it is appropriate for the Court first to consider the legality of the arrest and the seizure in this case. As we have explained, the question whether, under *Payton*, an officer acting on probable cause but without exigent circumstances can induce a suspect to leave his house for the purpose of arresting him is an issue of great practical importance on which the lower courts are in disarray. The Court in *Leon* specifically stated that "[t]here is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated. * * * If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers * * *, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue." Slip op. 25 (citation omitted). Resolution of the question whether the Fourth Amendment required the officers to obtain a warrant before arresting respondent by inducing him to leave a residence is needed "to guide future action by law enforcement officers." We therefore suggest that the Court first consider the substantive Fourth Amendment questions presented by this case and determine whether to admit the evidence under a reasonable mistake exception only if it finds that the Fourth Amendment was violated.

b. *i.* In our consolidated brief on the merits in *Leon*, *Quintero*, and *Massachusetts* v. *Sheppard*, No. 82-963, we explained why evidence seized as a result of police officers' reasonable mistake concerning the requirements of the Fourth Amendment should not be excluded at trial.[9] It would serve no purpose to attempt to encapsulate these arguments here. The Court granted certiorari to consider this question in *Quintero*, and it remains sufficiently substantial to warrant the Court's attention.

ii. Whatever room for disagreement there may be concerning the Fourth Amendment issues presented by this case, we submit that the overall conduct of the officers was manifestly reasonable and therefore does not call for application of the exclusionary rule. As our discussion of the legality of the arrest demonstrates, any police officer familiar with the language and logic of this Court's opinions—particularly its opinion in *Payton*—would surely have had abundant reason to believe that he could arrest respondent without a warrant so long as, in so doing, he did not cross the threshold of the house without consent or exigent circumstances.

Moreover, although we have not separately presented the question whether exigent circumstances would have justified the officers in proceeding without a warrant even if one were otherwise required, the conclusion of the courts below that exigent circumstances did not exist is incorrect. At the very least, if the officers—who testified that they did not obtain a warrant because they did not believe they had sufficient time to do so (C.A. App. 57, 68)—were mistaken in their conclusion that exigent circumstances

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[9] We have served a copy of that brief on counsel for petitioner.

existed, their mistake was reasonable. The officers knew that a large cache of dangerous weapons, including at least one illegal weapon, was in a home in a residential area. They had been told that the individuals in possession of the weapons had threatened to kill law enforcement officers. The events in issue took place on a weekend night—at around 10:00 p.m. on a Sunday (see C.A. App. 33, 38)—and Chief Alcorn testified that it would have been difficult to obtain a magistrate to issue a warrant (see *id.* at 68). Once they were warned of the violent propensities of respondent's group, the officers at all times acted as if they were confronted with an emergency: they left to seek reinforcements in such haste that they did not even record the license plate number of the Cadillac; they established roadblocks; and within approximately an hour they had surrounded the house in which the weapons were kept. The court of appeals emphasized (App., *infra*, 7a-8a, 10a) the brief meeting that the officers conducted near the house. But the fact that the officers met to coordinate their tactics and plan how best to avoid danger to themselves surely does not bely the existence of exigent circumstances. Contrary to the court of appeals, the fact that such a meeting occurred does not mean that the arrest was not made "in the course of an ongoing investigation in the field" (LaFave, *"Seizures" Typology: Classifying Detentions of the Person To Resolve Warrant, Grounds, and Search Issues*, 17 U. Mich. J. L. Ref. 417, 456 (1984)).

Thus, the officers had two independent, reasonable bases—one depending on an uncertain legal question and one on the application of settled doctrine to the facts confronting the officers—for believing that they were entitled to arrest respondent without a warrant.

As we have noted, it appears that the court of appeals ruled that the officers' other action—the seizure of the weapon—was unlawful only because the court believed it to be the fruit of an illegal arrest. In any event, we have shown that the seizure of the weapon can be justified on the ground that it did not involve a search; that any search involved in seizing the weapon was justified by probable cause and exigent circumstances; and that any such search was incident to respondent's arrest. Even if this Court disagrees with all of our submissions and concludes that the seizure of the weapon somehow violated the Fourth Amendment, it seems clear beyond doubt that the officers did not act unreasonably in concluding that they did not have to leave a dangerous and patently illegal weapon at the threshold of the house after it had been brandished at them by respondent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5766

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN HENRY MORGAN, DEFENDANT-APPELLEE

On Appeal from the United States District Court
for the Eastern District of Tennessee

Decided and Filed September 13, 1984

Before: KEITH, MARTIN, and WELLFORD, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined. WELLFORD, Circuit Judge, (p. 19) filed a separate concurring opinion.

BOYCE F. MARTIN, JR., Circuit Judge. The United States appeals an order of the district court granting a motion to suppress a .45 caliber pistol, model M-70, converted to fully automatic, which had not been registered in the National Firearms Registration and Transfer Record as required by 26 U.S.C. § 5861(d)

and 5871. The pistol was taken when John Henry Morgan was arrested at his mother's home in Harriman, Tennessee on June 13, 1982. This matter is properly before the court pursuant to 18 U.S.C. § 3731.

During the evening on June 13, 1982, the Sheriff's Department of Morgan County, Tennessee, received a complaint about target shooting at Potter's Falls, a public park located in Morgan County. According to the complaint, several people were shooting into a clay bank inside the park. Responding to the complaint, Sheriff Roger Reynolds and officer Teddy Bells drove to the park in an unmarked car. As they approached the park, they heard what sounded like automatic weapons being fired. Inside the park, they saw five or six people, including Morgan, loading guns into the trunk of a blue Cadillac. Sheriff Reynolds approached them and told them a complaint had been received about guns being fired in the park. At the suppression hearing he testified that he also saw what appeared to be the folding stock for an automatic shoulder weapon being thrown into the trunk of the car. After telling them about the complaint, the Sheriff asked the group to leave the park, which they agreed to do.

As the Sheriff was leaving, he told Deputy Sheriff Bells that "we need to look in the trunk." They turned back in the direction of Morgan and his friends and observed the closing of the trunk. The Sheriff recorded the license number of the car which was an out-of-state plate beginning with the prefix "95." While still observing the preparations to leave by Morgan and his friends, an unidentified observer approached the officer and told them:

> If you get out of the car and attempt to arrest these people they will shoot you. They have done made the comment that they will kill any law that tries to arrest them. The best thing you ought to do is to get out of here and go get some help.

He also told Sheriff Reynolds the trunk of the Cadillac was filled with machine guns, pistols, and shotguns.

The Sheriff then immediately left the park and radioed for reinforcements from the Morgan County Sheriff's office. Other deputies later returned to the park with Sheriff Reynolds. However, Morgan and his friends had left. An alert was then broadcast requesting a lookout for a blue Cadillac with an out-of-state license plate beginning with the prefix "95." Sheriff Reynolds warned in the alert that, based upon the information he had received from the unidentified bystander, the occupants were armed with automatic weapons and considered dangerous.

Sometime after Reynolds' dispatch, Officer Isham of the City of Harriman Police Department spotted the Cadillac and followed it to the home of Elizabeth Morgan, the mother of defendant Morgan. Isham observed several people get out of the car and take an assortment of weapons into the Morgan home. He then radioed Thomas Alcorn, Assistant Chief of the Harriman Police Department, who in turn contacted Sheriff Reynolds. Isham, along with Officer Steelman, who arrived shortly after Isham's radio dispatch to Chief Alcorn, remained on guard and unobserved outside the Morgan home waiting for the other officers to arrive. During this period, they observed no unusual or threatening activity around the house.

After receiving Isham's radio alert, Chief Alcorn and several of his officers met in a local coffee shop where they "assessed the situation." According to Chief Alcorn's testimony at the suppression hearing, he discussed the logistics of approaching the Morgan home and "gave [his] men their assignments and positioned everybody, and we moved from there." Before leaving the coffee shop, however, Chief Alcorn and his men waited for the arrival of the officers from Morgan County.

When Alcorn and his squad of nine officers, including Sheriff Reynolds and his deputies, arrived at the Morgan home, Chief Alcorn drove his car, with his lights off, into the yard and parked it to the rear and right of the Cadillac. At the same time, the other officers surrounded the Morgan home. Alcorn then flooded the house with spotlights and summoned Morgan from his mother's home with the blaring call of a bullhorn.

Responding to the coercive activity outside of the house, Morgan appeared at the front door holding a pistol in his hand. Alcorn ordered Morgan to put down the weapon. Morgan then raised the gun. Chief Alcorn repeated his order, and Morgan put the gun down inside the door and went outside. After leaving the house, Morgan was formally arrested, handcuffed, and frisked. During the frisk the police removed a loaded pistol from Morgan's right rear pocket. Those in the house were then called outside by Chief Alcorn. After they left, Chief Alcorn ran into the house and picked up the pistol left inside the door by Morgan. Two other officers then searched the whole house and found close to a dozen loaded guns inside the Morgan living room. These shotguns, rifles, and pistols were also seized by the police. The only weapon found to

violate any statutory firearms requirement was the .45 caliber pistol found inside the door.

During the one- to two-hour period between Sheriff Reynolds' first observation of Morgan at Potter Falls and Morgan's subsequent arrest, no effort was made by any law enforcement agency to obtain a search or arrest warrant. When asked at the suppression hearing why he did not obtain a warrant from one of the judges available on the weekend, Chief Alcorn stated: "Well, generally—we have tried to, on several occasions, to contact the judges on the weekend and either one of the judges are hard to reach on the weekend."

The district court granted Morgan's motion to suppress the .45 caliber pistol seized by Chief Alcorn which was the only basis for federal charges against Morgan. The district court found no exigent circumstances justifying the police officers' warrantless entry and subsequent search of the Morgan home. In the opinion of the court, "there was sufficient time" to obtain an arrest or search warrant. Because we agree there were no exigent circumstances justifying the warrantless entry of the home and arrest of Morgan, we affirm the order of the district court.

Absent exigent circumstances, police officers may not enter an individual's home or lodging to effect a warrantless arrest or search. *Payton* v. *New York*, 445 U.S. 573, 590 (1980). As clearly stated in *Payton*, 445 U.S. at 590:

> In terms that apply equally to seizures of property and to seizures of the person, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshhold may not be reasonably crossed without a warrant.

This is not a novel idea. As eloquently explained by Justice Jackson in *Johnson* v. *United States*, 333 U.S. 10, 14 (1948),

> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's home secure only in the discretion of police officers. . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to society which chooses to dwell in reasonable security and freedom from surveillance.

See also Welsh v. *Wisconsin*, 52 U.S.L.W. 4581, 4584 n.10 (May 15, 1984) (fourth amendment prohibits the police from making a warrantless night entry of a person's home in order to arrest him for violation of a nonjailable traffic offense). This principle has been consistently applied in this circuit. *United States* v. *Kinney*, 638 F.2d 941, 943 (6th Cir.), *cert. denied* 452 U.S. 918 (1981); *United States* v. *Renfro*, 620 F.2d 569, 574 (6th Cir. 449 U.S. 902 (1980); *United States* v. *Killebrew*, 560 F.2d 729, 733 (6th Cir. 1977). Moreover, the burden is on the government to demonstrate exigency. *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970); *McDonald* v. *United States*, 335 U.S. 451, 456 (1948); *United States* v. *Killebrew*, 560 F.2d at 733. Also, a district court's factual finding on the existence of exigent circumstances will not be disturbed unless clearly erroneous. *United States* v. *Gargotto*, 510 F.2d 409, 411 (6th Cir. 1974), *cert. denied*, 421 U.S. 987, *reh. denied*, 423 U.S. 884 (1975); *United States* v. *Flickinger*, 573 F.2d 1349,

1356-57 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978); *see also United States* v. *Collis*, 699 F.2d 832, 835 (6th Cir.), *cert. denied*, 103 S.Ct. 3088 (1983) (district court's finding on whether an illegal seizure has occurred subject to clearly erroneous test). In *United States* v. *Flickinger*, 573 F.2d at 1355, the court explained that the "[t]erm 'exigent circumstances,' in conjunction with an arrest in a residence, refers to a situation where the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." *See also United States* v. *Blake*, 632 F.2d 731, 733 (9th Cir. 1980). Moreover, the critical time for determining whether exigency exists "is the moment of the warrantless entry by the officers" onto the premises of the defendant. *United States* v. *Killebrew*, 560 F.2d at 733.

The record here reveals no exigency sufficient to justify the warrantless entry of the home and arrest of Morgan. None of the traditional exceptions justifying abandonment of the warrant procedure are present here. The officers involved were not in hot pursuit of a fleeing suspect. *See United States* v. *Santana*, 427 U.S. 38, 42-43 (1976); *Warden* v. *Hayden*, 387 U.S. 294, 298-99 (1967); *United States* v. *Williams*, 612 F.2d 735, 739 (3rd Cir. 1979), *cert. denied*, 445 U.S. 934 (1980) (warrantless entry upheld where officers first began surveillance having good cause to believe that they would need to wait only a few minutes before defendant exited from private resident). Chief Alcorn specifically testified that he and his officers had sufficient time to assemble at a local coffee shop where they "assessed the situation" and waited for Sheriff Reynolds' arrival before proceeding to the Morgan home. This fact directly contradicts the claim of the United States that the

police officers involved here were in hot pursuit of Morgan from the time they first confronted him in Potters Falls until the time his Cadillac was spotted next to his mother's home. The "hot pursuit" exception to a warrant requirement may not be invoked merely because police officers find it inconvenient to obtain a warrant before proceeding with an arrest. On the contrary, the "hot pursuit" exception is reserved for stiuations where speed is essential to protect a compelling governmental interest. *Hayden* v. *Warden, supra,* 387 U.S. at 298-99; *United States* v. *Elkins,* 732 F.2d 1280, 1285 (6th Cir. 1984). Here, the facts indicate that the officers did not feel an "urgent need for immediate action." *United States* v. *Flickinger, supra,* 573 F.2d at 1355. "Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of search [or arrest] warrant." *McDonald* v. *United States,* 335 U.S. 451, 454 (1948).

Nor was this a situation where a suspect represented an immediate threat to the arresting officers or the public which justified the absence of a warrant. The United States argues no warrant was required because the police conduct constituted a "cursory safety check," which is a recognized exception to the warrant requirement. *See United States* v. *Kolodziej,* 706 F.2d 590, 596-97 (5th Cir. 1983) (and cases cited therein). We disagree. To satisfy the cursory safety check exception "the government must show that there was 'a serious and demonstrable potentiality for danger.' " *United States* v. *Kolodzeij, supra,* 706 F.2d at 596, quoting *United States* v. *Smith,* 515 F.2d 1028, 1031 (5th Cir. 1975) (per curiam), *cert. denied,* 424 U.S. 917 (1976). The record in this case reveals no such immediate threat or

security risk to the officers involved here. As found by the district court, the evidence "shows that the occupants of the [Morgan] house were peaceful until startled by Officer Alcorn's car coming up their driveway in a clandestine manner." Moreover, Morgan's prior contact with police officials had been friendly and cooperative. There was no substantiated evidence that Morgan was dangerous or that a grave offense or crime of violence had occurred or was even threatened. *United States* v. *Killebrew*, 560 F.2d at 734. Other than the unconfirmed information supplied to Sheriff Reynolds by an unidentified person, the police officers could point to no other substantiated evidence that indicated Morgan or his companions posed an impending threat to the police or to the public. Indeed, all the proven evidence indicates Morgan and his friends posed no risk to anyone until the police officers surrounded the Morgan home and flooded it with high-powered spotlights. *See United States* v. *Hatcher*, 680 F.2d 438, 444 (6th Cir. 1982) (government failed to show evidence indicating that defendant was a dangerous individual to justify warrantless "protective sweep" of defendant's home). We believe that looking at the totality of the circumstances, the district court was correct in conducting that the facts did not indicate any risk to justify a warrantless entry into the Morgan home. *See United States* v. *Killebrew*, *supra*, (where there were no facts indicating occupant was dangerous or about to escape, warrantless entry into suspect's motel room violated fourth amendment, even though police knew occupant possessed a gun); *see also United States* v. *Gamble*, 473 F.2d 1274, 1277 (7th Cir. 1973). To justify this type of warrantless intrusion, police officers "must be able to point to specific and articulable facts

which, taken together with other rational inferences from those facts, reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). Police officials, however, are not free to create exigent circumstances to justify their warrantless intrusions. *United States* v. *Allard II*, 634 F.2d 1182, 1187 (9th Cir. 1980); *United States* v. *Allard I*, 600 F.2d 1301, 1304 n.2 (9th Cir. 1979) ("If exigent circumstances were created, they resulted from the agent's own conduct.")

Finally, there can be no claim that immediate police action was needed to prevent the destruction of vital evidence or thwart the escape of known criminals. *See Warden* v. *Hayden, supra*; *United States* v. *Butler*, 533 F.2d 221, 223-24 (5th Cir. 1976) (per curiam), *cert. denied*, 434 U.S. 865 (1977). Morgan and his friends were peacefully occupying a private home in the evening until they were alarmed by the surreptitious police approach and the bright lights. There is absolutely no evidence in the record that Morgan or his friends were engaged in the destruction of evidence or about to remove contraband to another jurisdiction.

In sum, there were no exigent circumstances justifying the warrantless intrusion by the police onto the Morgan property. As Chief Alcorn testified, Morgan's arrest was a planned occurrence, rather than the result of an ongoing field investigation. *See Welsh* v. *Wisconsin*, 52 U.S.L.W. at 4585, (hot pursuit exception to warrant requirement rejected "because there was no immediate or continuous pursuit of the [defendant] from the scene of the crime); 2 W. La. Fave, Search and Seizure § 6.1(c) pp. 386-392. *Cf. Coolidge* v. *New Hampshire*, 403 U.S. 443, 471 n.27 (1971). Therefore, a warrant should have been obtained before proceeding to the Morgan home. Ar-

guably, Morgan's activities in the park may have provided probable cause for the issuance of a warrant. This, however, can not excuse the failure to secure a warrant. Police officers may not, in their zeal to arrest an individual, ignore the fourth amendment's warrant requirement merely because it is inconvenient. *Johnson* v. *United States*, 333 U.S. 10, 15 (1948). Absent exigent circumstances, the privacy of a home may not be invaded without a warrant. *Payton* v. *New York*, 445 U.S. at 590.

As an alternative justification for its actions, the United States argues that the facts here, "at the very least," provided the reasonable suspicion of a weapons violation necessary to support a brief investigatory stop of Morgan and his group. *See Terry* v. *Ohio*, 392 U.S. 1 (1968). The government then contends that once Morgan appeared at the door holding a weapon in plain view, the police were justified in immediately arresting him and seizing the weapon. Even assuming the validity of this legal theory,[1] the police conduct outside of the Morgan home cannot be characterized as a brief investigatory stop. On the contrary, the record provides ample proof that, "as

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[1] As pointed in *Davis* v. *Mississippi*, 394 U.S. 721, 726-27 (1969), "the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be term 'arrests' or 'investigatory detentions.'" And the Court has rejected "the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest or a full-blown search.'" *Terry* v. *Ohio*, 392 U.S. at 19, *quoted in Davis* v. *Mississippi*, 394 U.S. at 727. Thus labeling the police conduct as an investigatory stop does not preclude constitutional scrutiny of the police conduct here.

a practical matter, [Morgan] was under arrest," *Florida* v. *Royer*, 103 S.Ct. 1319, 1327, 75 L. Ed. 2d 229, 240 (1983) (plurality opinion), as soon as the police surrounded the Morgan home, and therefore, the arrest violated *Payton* because no warrant had been secured. The police show of force and authority was such that a "reasonable person would have believed he was not free to leave." *United States* v. *Mendenhall*, 446 U.S. 544, 554-55 (1980), (opinion of Stewart, J.); *United States* v. *Robinson*, 650 F.2d 537, 538 (5th Cir. 1981). To describe the encounter between the police and Morgan as a "brief investigatory stop" ignores the facts of this case. Nine police officers and several patrol cars approached and surrounded the Morgan residence in the dark. The officer in charge strategically positioned his car in the driveway in front of the Morgan home blocking any movement of his car. The police then called for Morgan to come out of the house. "These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed he was not free to leave.'" *Florida* v. *Royer*, —— U.S. at ——, 103 S.Ct. at 1326-1327 (plurality opinion), *id.* at 1330 (Brennan, J., concurring in result), *id.* at 1332-1333 (Blackmun, J., dissenting), quoting *United States* v. *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.). Viewed objectively, Morgan was placed under arrest, without the issuance of a warrant, at the moment the police encircled the Morgan residence.

The government's reliance on *Washington* v. *Chrisman*, —— U.S. ——, 102 S. Ct. 812 (1982), is misplaced. In *Chrisman*, the Court held it reasonable for a police officer to monitor the movements of a person *lawfully arrested*, even if it resulted in a war-

rantless entry into a residence. *Id.* at 817. However, the reasoning of *Chrisman* does not apply here for two reasons. First, the initial detention in *Chrisman* was a lawful arrest; here Morgan's arrest was unlawful because there was no warrant for his arrest. Secondly, in *Chrisman* the person initially arrested invited the police officer to accompany him to his dormitory room. This in turn led to the observation of contraband in the dorm room and resulted in the prosecution of his roommate, Chrisman. Here, Morgan did not invite anyone anywhere. As far as this record indicates, he knew nothing of the investigation undertaken by Chief Alcorn.

Nor do the Court's recent holdings in *United States* v. *Leon*, —— U.S. —— (1984), and *Segura* v. *United States*, —— U.S. —— (1984), affect the result in this case. *Leon* held that the fourth amendment's exclusionary rule should not be utilized to bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a magistrate which was later determined to be invalid. *Segura* v. *United States* concerned whether, "because of an earlier illegal entry, the [f]ourth [a]mendment requires suppression of evidence seized later from a private residence pursuant to a valid search warrant which was issued on information obtained by the police before the entry into the residence." *Id.* at (slip op. at 1). The *Segura* Court decided that the evidence obtained pursuant to the search warrant should not have been suppressed because the "warrant and information on which it was based were unrelated to the (earlier illegal) entry and therefore constituted an independent source for the evidence under *Silverthorne Lumber Co.* v. *United States* 251 U.S. 385 (1920)." *Segura*, —— U.S. at —— (slip op. at 2).

Here, it is undisputed that the officers did not have a search or arrest warrant, nor were they in the process of obtaining such a warrant.

The government, however, maintains that with or without exigent circumstances, no warrant was needed to call Morgan out of his home. The cases cited by the government in support of this claim, *United States* v. *Renfro*, *supra*, 620 F.2d at 574-75, *McGeehan* v. *Wainwright*, 526 F.2d 397 (5th Cir.), *cert. denied*, 425 U.S. 997 (1976), *United States* v. *Herring*, 582 F.2d 535, 543 (10th Cir. 1978), and *United States* v. *Smith*, 515 F.2d at 1031-32, do not support this argument. *Renfro* involved police officers forcibly entering the home of suspects wanted for serious felonies. The forcible entry in *Renfro* was necessitated by the suspects apparent destruction of evidence. No such destruction of evidence was present here. *Herring* involved the peaceful arrest of a suspect outside of his motel as he responded to the knocks of the arresting officers. The arrest here was hardly peaceful. Moreover, to the extent that the *Herring* court validates the warrantless arrest of an individual standing in the doorway of a private residence absent exigent circumstances, we believe the rule of *Payton* v. *New York*, would compel a contrary result had *Herring* been decided subsequent to the *Payton* decision. *McGeehan*, decided prior to *Payton*, involved the unplanned, warrantless arrest of robbery suspects located inside a trailer home shortly after the police had received information identifying the suspects and their escape car. Here, the arrest of Morgan was a planned event; it was not the result of an ongoing field investigation. *Smith* also decided prior to *Payton*, involved the arrest of a suspect, based on a valid warrant, who was discovered by

police inside his mobile home. None of these cases support the assertion that police officers may arouse and seize a citizen, peacefully residing in the privacy of his home, without exigent circumstances to support the intrusion. In fact, the Supreme Court has repeatedly rejected the claim that police may arbitrarily invade an individual's expectation of privacy. The Court has declared that "[a]t the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). To protect this important right, the framers of the amendment required that judicial approval be obtained before police be allowed to intrude into the privacy of the home, absent exigent circumstances. *McDonald* v. *United States*, 335 U.S. 451, 455-56 (1948); *Johnson* v. *United States*, 333 U.S. at 13-14. Therefore, arbitrary governmental intrusions into the sanctity of the home are the prime evils the fourth amendment was designed to deter.

The government further argues that the rule of *Payton* is inapplicable here because the officers in question did not cross the threshold until Morgan was arrested after appearing at the door with gun in hand. We disagree. In *Payton* v. *New York*, police officers, with probable cause to arrest, knocked on the door of Obie Riddick's apartment. After Riddick's three-year-old son opened the door, the police could see Reddick sitting in bed. The police then entered the residence and arrested Riddick. *Payton*, 445 U.S. at 578. In finding this arrest invalid, the Supreme Court held that, absent exigent circumstances, warrantless intrusions into a suspect's home are unconstitutional. Similarly, in *United States* v.

Johnson, 626 F.2d 753 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537, 102 S. Ct. 2579 (1982), FBI agents, using fictitious names, knocked on the door of Raymond Johnson with their guns drawn. When Johnson opened the door, the agents identified themselves and asked to talk to Johnson. Johnson invited them in. After the agents were inside, they arrested Johnson. The Ninth Circuit, relying on the rule of *Payton*, held "the arrest of Johnson, while he *stood within the door of his home*," violated the fourth amendment because no warrant had been obtained and no exigent circumstances existed to justify the warrantless intrusion. *United States* v. *Johnson*, 626 F.2d at 757 (emphasis added). The court specifically noted that

> [i]n this case, we are confronted with the situation where the suspect was arrested as he stood inside his home with drawn weapons. In these circumstances, it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. Otherwise, arresting officers could avoid illegal "entry" into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the "reach" of the arresting officers.

United States v. *Johnson*, 626 F.2d at 757.[2] We agree with the Ninth Circuit that the important con-

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[2] In *United States* v. *Whitten*, 706 F.2d 1000, 1015 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 1593 (1984), and *United States* v. *Botero*, 589 F.2d 430, 432 (9th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979), the Ninth Circuit has interpreted *United States* v. *Santana*, 427 U.S. 38 (1976), to allow the warrantless arrest of an individual as he stands in the door-

sideration in this type of case "is the location of the arrested person, and not the arresting agent, that determines whether an arrest occurs within a home."

Applying this rule here, it is undisputed that Morgan was peacefully residing in his mother's home until he was aroused by the police activities occurring outside. Morgan was then compelled to leave the house. Thus, as in *Johnson*, *supra*, "it cannot be said that [Morgan] voluntarily exposed himself to a warrantless arrest" by appearing at the door. On the contrary, Morgan appeared at the door *only because of* the coercive police behavior taking place outside of the house. *See Johnson* v. *United States*, 333 U.S. at 13 (police entry to defendant's living quarters "granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right"). Viewed in these terms, the arrest of Morgan occurred while he was present inside a private home. Although there was no direct police entry into the Morgan home prior to Morgan's arrest, the constructive entry accomplished the same thing, namely, the arrest of Morgan. Thus, the warrantless arrest of Morgan, as he stood within the door of a private home, after emerging in response to coercive police conduct, violated Morgan's fourth amendment rights. A contrary rule would undermine the constitutional precepts emphasized in *Payton*. *See United States* v. *McCool*, 526 F.Supp. 1206, 1209 (M.D. Tenn. 1981) ("to uphold warrantless arrests at a

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way of a private residence. However, in *Botero* the court found sufficient exigency to justify the warrantless entry and arrest of the defendant. *United States* v. *Botero*, 589 F.2d at 432. To the extent that *Whitten* validates the warrantless arrest of individuals standing in the doorway of a private residence absent exigent circumstances, we believe that this holding is contrary to the rule established in *Payton*.

person's home whenever law enforcement officers successfully obtain his presence at a door too readily allows subversion of the *Payton* principle"). And because Morgan's arrest was unlawful, any evidence seized incident to that arrest was obtained illegally and therefore must be suppressed. *Payton* v. *New York, supra; Davis* v. *Mississippi*, 394 U.S. 721, 724 (1969); *Taylor* v. *United States*, 286 U.S. 1, 5 (1932).

Finally, the warrantless seizure of Morgan's gun cannot be supported by the "plain view" doctrine. The "plain view" doctrine permits the warrantless seizure of private possessions where three requirements are satisfied:

> First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover incriminating evidence "inadvertently," which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain view doctrine only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.

Texas v. *Brown*, —— U.S. ——, ——, 103 S Ct. 1535, 1540 (1983) (citations omitted) (plurality opinion); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-70 (1971) (plurality opinion). Here the facts fail to satisfy the first prong of the "plain view" doctrine because the police officers in this case did not "lawfully make an 'initial intrusion' or [were not] otherwise . . . properly in a position" from which an

item of contraband could be viewed. The appearance of the police and the arrest of Morgan was not the result of an exigency authorizing the police presence. Thus, the police were not "lawfully engaged" in legitimate police activities at the moment the object in question came into "plain view." *Texas* v. *Brown*, 103 S. Ct. at 1541. "The primary requisite for . . . application of the plain view doctrine is that the police officer has a right to be where he is when he sees the evidence." *United States* v. *Blalock*, 578 F.2d 245, 248 (9th Cir. 1978). Moreover, even assuming that the police officers were rightfully in a position to view the gun, the "plain view" doctrine does not authorize warrantless entries into a private home merely because an item of contraband has become visible to those outside. As stated by Justice Stewart in *Coolidge*, *supra*:

> [P]lain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. *Taylor* v. *United States*, 286 U.S. 1, 76 L. Ed. 951, 52 S. Ct. 466; *Johnson* v. *United States*, 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367; *McDonald* v. *United States*, 335 U.S. 451, 93 L. Ed. 153, 69 S. Ct. 191; *Jones* v. *United States*, 357 U.S. 493, 497-

> 498, 2 L. Ed. 2d 1514, 1518, 78 S. Ct. 1253; *Chapman* v. *United States*, 365 U.S. 610, 5 L. Ed. 2d 828, 81 S. Ct. 776; *Trupiano* v. *United States*, 334 U.S. 699, 92 L. Ed. 1663, 82 S. Ct. 1229.

Coolidge, *supra*, 403 U.S. at 486 (emphasis in original; footnote omitted). Here, the conduct of the police went beyond permissible bounds. Because the initial intrusion by the police was illegal, any evidence or contraband discovered as a result of that intrusion was illegally obtained. *United States* v. *Williams*, 604 F.2d 1102, 1123 (8th Cir. 1979); *United States* v. *Cisneros*, 448 F.2d 298, 303 n.6 (9th Cir. 1971) ("Assuming a valid basis for arrest, an illegal method of execution, for instance an unlawful forcible entry, can result in the exclusion of any evidence obtained as a result of the officer's illegal conduct.").

As recently confirmed by the Court, the privacy of the home "deserve[s] the most scrupulous protection from governmental invasion." *Oliver* v. *United States*, —— U.S. ——, ——, 52 U.S.L.W. 4425, 4427 (April 17, 1984); *See also United States* v. *Karo*, —— U.S. ——, ——, 52 U.S.L.W. 5102, 5104 (1984); *Welsh* v. *Wisconsin*, *supra*. The warrant requirement of the fourth amendment is not a ritual which can be ignored because it may be inconvenient.

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . [T]he Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that

> constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. *United States*, 335 U.S. 451, 456 (1948). The Supreme Court has repeatedly "underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones* v. *United States*, 357 U.S. 493, 498 (1958). And the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972). The police officers here violated this constitutional principle. Accordingly, we find that Morgan was illegally arrested when the police surrounded the Morgan home and utilized coercive tactics and physical restraints which induced his presence at the door. And because this conduct was not justified by a valid warrant or exigent circumstances, the subsequent police seizure of the gun placed inside of the door by Morgan was illegally obtained, and therefore, properly suppressed.

The judgment of the district court is affirmed.

WELLFORD, Circuit Judge, concurring.

I concur with the result reached and some of the reasoning of my brothers in this case. I write separately to express my view that under the circumstances known to the police officers concerning the very recent use and/or possession of suspected illegal weapons by defendant (and others) in a public park, there was no need for a warrant to enter on Morgan's mother's property to investigate and to attempt to question Morgan about his knowledge and/or involvement in the episode. Had the officers not used overly coercive tactics to draw Morgan out of the home thereby indicating an intent to place him under custody equivalent to an arrest, I would hold that the seizure in question was appropriate.

I find it unnecessary to decide whether a suspect standing in the doorway of a private residence responding to a reasonable police investigation or inquiry may thereafter be arrested without a warrant in the course of the interview. I doubt that *Payton* v. *New York*, 445 U.S. 573 (1980), *supra*, is applicable here because the officers did not enter into the mother's home to arrest Morgan without a warrant.

To the extent the majority's holding is limited to a conclusion that Morgan was, in effect, compelled to leave his mother's house by coercive police conduct not justified by exigent circumstances at the time, bringing about an apparently intended warrantless arrest, I concur. I think we need go no further. The seizure of the gun, despite its being in "plain view," was part and parcel of the improper warrantless arrest situation, and I therefore would affirm the judgment of suppression.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

C R. 3-82-48

UNITED STATES OF AMERICA

v.

JOHN HENRY MOGRAN

[Filed Oct. 8, 1982]

MEMORANDUM

In this criminal case the Grand Jury charges that on or about the 13th day of June, 1982 in the Eastern District of Tennessee, John Henry Morgan willfully and knowingly possessed a firearm, to-wit: an RPB Industries .45 caliber pistol, Model M-10, converted to fully automatic, which had not been registered to him in the National Firearms Registration and Transfer Record, as required by Chapter 53,Title 26, United States Code. 26 U.S.C. §§ 5861(d) and 5871.

Defendant has filed a motion to suppress all items of evidence obtained as a result of the search and seizure of the defendant and the premises occupied by him in Harriman, Tennessee on June 13, 1982. He also seeks to suppress all written or oral statements

made by him. He says that the searches and seizures, including the arrest, were illegally made without a warrant. Defendant says that at the time of the entry upon the premises occupied by him, there was no probable cause to believe that he had committed a felony, and there was no observation by the arresting officer of a misdemeanor committed by the defendant. He says any statements that he made were obtained as a result of a violation of his rights, and as the result of the illegal search and seizure, including the arrest.

The Government relies upon alleged exigent circumstances and the plain view doctrine for the arrest. In the opinion of the Court, the plain view doctrine does not apply. Neither did exigent circumstances exist in this case. The officers, in the opinion of the Court, should have obtained an arrest and/or search warrant.

The evidence shows that on the evening of June 13, 1982, Deputy Roger Reynolds and Deputy Teddy Bales of the Morgan County Sheriff's Department received a complaint of people firing weapons in the Potter's Falls area of Morgan County. The officers drove to the Potter's Falls area. Deputy Reynolds heard what he thought was gunfire from an automatic weapon. The officers found five or six people who had been shooting into a clay bank, commonly used for target practice. The officers went up to the people, told them of the complaint, and asked them to quit shooting and leave. An unnamed bystander told Deputy Reynolds that one of the group said they would shoot anyone who attempted to interfere with them. The weapons had been placed in the truck of a 1970 blue Cadillac with non-Tennessee license plates and a "95" prefix. After telling the people to leave

and talking to the bystander the officers drove back to the Sheriff's office for assistance.

Law enforcement officers from Morgan and Roane Counties and the city of Harriman were alerted. Approximately an hour after Deputies Reynolds and Bales left the Potter's Falls area, the Cadillac was located at the residence of defendant's mother in Harriman. Nine officers soon arrived and surrounded the house. Officer Thomas Alcorn of the Harriman Police Department drove his car in front of the house and parked to the rear and right of the Cadillac, inside the yard. His car lights were off. Officer Alcorn then turned bright floodlights on the house. He called over a loud speaker for defendant to come out.

In the meantime, defendant, his wife, and three others had taken the guns into the living room of the house where defendant was staying at the time. Defendant's wife saw the outline of Officer Alcorn's car coming up the alley to the house. She did not know who it could be. She allerted defendant. He then picked up a weapon and stood behind the front screen door. When called out by Officer Alcorn, defendant put the gun down inside the house and went outside. The police then called the others from the house and searched for weapons.

It has been consistently held that

> searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-documented exceptions.

Katz v. *United States*, 389 U.S. 347, 357 (1967).

The Government first contends that there was no search in this case since plaintiff came to the door with a weapon "in plain view" of Officer Alcorn. The plain view doctrine, however, has been limited to instances where an officer had "a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). We do not find a prior justification for Officer Alcorn's entry onto the property without a search or arrest warrant. This is not a case where the officers were in "hot pursuit" of a fleeing felon, *Warden v. Hayon*, 387 U.S. 294 (1967), or were monitoring the activities of one already under arrest. *See Washington v. Chrisman*, —— U.S. ——, 102 S.Ct. 812 (1982). Before arriving at the house, the officers only knew that a car parked at the house had been seen where people had been target shooting, and that two officers thought they heard automatic gunfire in the area of the shooting. Although a bystander at the Falls told the officers that violence had been threatened, the identity of the bystander and his reliability remain a mystery. *See Beck* v. *Ohio*, 379 U.S. 89, 93-94 (1964). All evidence shows that the people left the Potter's Falls area peacefully and were quietly sitting at home when the startling police intrusion took place.

The Government contends that it had probable cause to search and arrest the defendant based on the above information. Even if the officers did have probable cause, we do not believe exigent circumstances required proceeding without a warrant. *See Payton v. New York*, 445 U.S. 573 (1980); *Katz v. United States*, 389 U.S. 347.

The evidence shows that three judicial officials who were authorized to issue search warrants lived in the city of Harriman or close outside the city limits. The police officers made no attempt to contact any of these judges before defendant's arrest. According to the testimony of Officer Thomas Alcorn, an hour elapsed from the time defendant was told to leave the Potter's Falls area and the discovery of the Cadillac in Harriman. Nine officers from Harriman, Roane County, and Morgan County were involved in the arrest. In the opinion of the Court, there was sufficient time to obtain a search warrant. If any of the occupants of the home had undertaken to leave, one or more of the officers could have prevented his leaving until a warrant was obtained.

The Government says that proceeding quickly was necessary because of the potential danger of the weapons in the Harriman residential neighborhood. The evidence, however, shows that the occupants of the House were peaceful until startled by Officer Alcorn's car coming up the driveway in a clandestine manner. Defendant immediately left the house when called out. It appears that the officers, in their overzealous attempt to arrest defendant, at least contributed to any exigent circumstances that arose. Reasonable searches may be undertaken for the protection of the public and police officers even if there is no probable cause to arrest for a crime. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). This rule, however, does not allow officers to create a situation in which to justify a warrantless search.

The home in America is a sacred place. For officers to enter a home without a search warrant, the circumstances must be extraordinary. In the opinion of the Court, the circumstances known by the officers

should have been sufficient to create probable cause for the issuance of a search warrant. We find, however, that these circumstances did not justify the warrantless entry onto the property and the subsequent search of the house in this case. Failure to obtain a warrant prevents all of the evidence obtained during the warrantless entry from being competent at the trial on the merits.

It is, therefore, ORDERED and ADJUDGED that the motion to suppress be, and the same hereby is, sustained.

Order Accordingly.

/s/ Robert L. Taylor
United States District Judge

APPENDIX C

* * * * *

THE COURT: The Grand Jury charges that on or about the 13th day of June 1982 in the Eastern District of Tennessee, the defendant, John Henry Morgan, willfully and knowingly possessed a firearm, to wit: an RPB Industries .45 caliber pistol, Model M-10, converted to fully automatic, which had not been registered to him in the National Firearms Registration and Transfer Record, as required by Chapter 53, Title 26, United States Code, Title 26, Sections 5861(d) and 5871.

Mr. Morgan had filed a motion to suppress. He says in this motion that all items obtained, all items of evidence obtained as a result of the search and seizure of the defendant and the premises occupied by this defendant in Harriman, Tennessee and on or about June the 13th, 1982, and all written or oral statements made by defendant. He says that the searches and seizures, including the arrest, were illegally made without a warrant; that at the time of the illegal entry and upon the premises occupied by the defendant there was no probable cause to believe that the defendant had committed a felony, and there was no observation by a resident officer of a misdemeanor committed by the defendant. He says any statements that he made were obtained as a result of a violation of his rights, and as the result of the illegal search and seizure, including the arrest, the motion is sustained.

The Government relies upon alleged exigent circumstances and the plain view doctrine for the arrest. In the opinion of the Court, the plain view doctrine does not apply. Neither did exigent circum-

stances exist in this case. The officers, in the opinion of the Court, should have obtained an arrest and/or search warrant.

The evidence shows the officers were nine in number. In the opinion of the Court, the acts and circumstances relied on by the Government do not apply in this case.

The home in America is a sacred place. For officers to enter a home without a search warrant, the circumstances must be extraordinary. If any of the occupants of this home had undertaken to leave during that time, one or more of those officers could have followed that one or could have held that one up until a search warrant could be obtained.

In the opinion of the Court, the circumstances existing at the time of this arrest and search of this home should have—were sufficient to create a probable cause for a search warrant. Failure to obtain a search warrant to make this search prevents all of this evidence from being competent at the trial on the merits.

It is, therefore, ordered and adjudged that the motion to suppress be, and the same hereby is, sustained.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5766

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN HENRY MORGAN, DEFENDANT-APPELLEE

[Filed Nov. 27, 1984]

Before: KEITH, MARTIN and WELLFORD, Circuit Judges.

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original sub-

mission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5766

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN HENRY MORGAN, DEFENDANT-APPELLEE

[Filed Sep. 13, 1984]

Before: KEITH, MARTIN and WELLFORD, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Tennessee

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the

judgment of the said District Court in this case be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

A True Copy.

Attest:

Deputy Clerk

Issued as Mandate:

COSTS:

Filing fee	$
Printing	$
Total	$

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Supreme Court, U.S.
FILED
MAR 25 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-1357

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

VS.

JOHN HENRY MORGAN

ON PETITION FOR A

WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE IN OPPOSITION TO PETITION

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9 pp

QUESTIONS PRESENTED

1. Wehther law enforcement officers who have probable cause to believe that a suspect committed a felony must obtain a warrant before inducing the suspect to leave his house so that they may arrest him, when the officers effect the arrest without entering the house.

2. Whether, assuming that officers violate the Fourth Amendment when they summon a suspect from his house without a warrant, a weapon that the suspect carries with him when he leaves the house should be treated as a fruit of the improper arrest.

3. Whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in the reasonable belief that the warrantless arrest of a felony suspect did not violate the Fourth Amendment.

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NO. 84-1357

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

VS.

JOHN HENRY MORGAN

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTION

Jurisdiction is admitted.

STATEMENT

Respondent generally agrees with the STATEMENT of the Petition except that, in paraphrasing, some of the "facts" tend to be distorted.

REASONS FOR DENYING THE PETITION

Question Number 1 does not fairly represent the factual circumstances of the hearing upon which the Circuit Court of Appeals based its decision. The unique facts of the warrantless arrest in the subject case do not form the proper basis for a clarification of "arrest law" which Petitioner seeks herein.

Question Number 2 also assumes circumstances as a basis for clarification which are unsupported by the facts present in the subject case, and is subject to the flagrant unconstitutionality of the intrusion and arrest of Respondent. The facts of this case fully support the finding of the Circuit Court of Appeals that Respondent was "..placed under arrest, without the issuance of a warrant, at the moment the police encircled the residence." (App. 12a)

Question Number 3 relies upon factual circumstances which would justify consideration of a reasonable belief" on the part of the arresting officers that they were not violating the Fourth Amendment, when to the contrary, the facts of the case clearly show that the arresting officers acted in reckless disregard of Respondent's constitutional rights and such was found by the Circuit Court of Appeals.

Wherefore, Respondent contends that the Questions sought to be considered by the Petitioner are not fairly represented by the facts of this case, that this case would not present a proper vehicle for a test of the principles of law sought to be established by Petitioner, and that the Petition should be denied.

In Question Number 1, Petitioner seeks to have the warrantless arrest in this case tested on the basis that Respondent was induced to leave his house so the officers could arrest him, and assumes that the officers effected the arrest without entering the house. This is not supported by the factual circumstances of the subject case.

The Circuit Court of Appeals, in a close scrutiny of the trial Court evidence found the following facts:

(1) "When Alcorn and his squad of nine officers, including Sheriff Reynolds and his deputies, arrived at the Morgan home, Chief Alcorn drove his car, with his lights off, into the yard and parked it to the rear and right of the Cadillac. At the same time, the other officers surrounded the Morgan home. Alcorn them flooded the house with spotlights and summoned Morgan from his mother's home with the blaring call of a bullhorn. Responding to the coercive activity outside of the house, Morgan appeared at the front door holding a pistol in his hand. (App. 4a)

(2) "...the record provides ample proof that, 'as a practical matter, [Morgan] was under arrest,' Florida v. Royer, 103 S.Ct. 1319, 1327, 75 L.Ed.2d 229, 140 (1983) (plurality opinion), as soon as the police surrounded the Morgan home, and therefore, the arrest violated Payton because no warrant had been secured. The police show of force and authority was such that a 'reasonable person would have believed he was not free to leave.' United States v. Mendenhall, 446 U.S. 544, 554-55 (1980), (opinion of Steart, J.); United States v. Robinson, 650 F.2d 537, 538 (5th Cir. 1981)." (App. 11a and 12a)

(3) "Nine police officers and several patrol cars approached and surrounded the Morgan residence in the dark. The officer in charge strategically positioned his car in the driveway in front of the Morgan home blocking any movement of his car. The police then called for Morgan to come out of the house. 'These circumstances surely amount to a show of official authority such that "a reasonable person would have believed he was not free to leave."' Florida v. Royer,----U.S. at ------, 103 S.Ct. at 1326-1327 (plurality opinion), id. at 1330 (Brennan, J., concurring in result), id. at 1332-1333 (Blackmun, J., dissenting), quoting United States v. Mendenhall, 446 U.S. at 554 (opinion of Stewart, J.). Viewed objectively Morgan was placed under arrest, without the issuance of a warrant, at the moment the police encircled the Morgan residence." (App. 12a)

In view of the above factual circumstances, it is suggested that the use of the term "induced" is not a fair characterization of the manner in which Respondent was brought out of his house. Nor is it a fair statement that the officers arrested Respondent without entering the house. Under these facts, the authority of the officers had clearly entered the house with the advent of their entering the premises, surrounding the house, turning the floor lights into the front of the house and broadcasting the "bull horn" commands therein.

Thus, the authorities cited by Petitioner, viz:

United States v Watson, 423 U.S. 411 (1976)

Gerstien v Pugh, 420 U.S. 103 (1975)

United States v Santana, 427 U.S. 38 (1976)

Terry v Ohio, 392 U.S. 1 (and related citations under footnote 3)

United States v Renfro, 620 F2d 574-75

McGeehan v Wainwright, 526 F2d 397 (5th Cir) cert denied 425 U.S. 997 (1976)

United States v Herring, 582 F2d 535, 543

United States v Smith, 515 F2d 1031-32

would be inapplicable to the subject case.

Question Number 1 fails to include any consideration of "exigent circumstancs," yet for the officers to arrest Respondent as the evidence describes, they must rely on exigent circumstances.

The U.S. District Court and Circuit Court of Appeals both found that there was no exigency sufficient to justify the warrantless entry of the home and arrest of (Respondent).

> "As found by the district court, the evidence 'shows that the occupants of the [Morgan] house were peaceful until startled by Officer Alcorn's car coming up their driveway in a clandestine manner.' Moreover, Morgan's prior contact with police officials had been friendly and cooperative. There was no substantiated evidence that Morgan was dangerous or that a grave offense or crime of violence had occurred or was even threatened. United States v. Killebrew, 560 F.2d at 734." (App. 9a)

The burden is on the government to demonstrate exigency.

> "Vale v. Louisiana, 399 U.S. 30, 34 (1970); McDonald v. United States, 335 U.S. 451, 456 (1948); United States v. Killebrew, 560 F2d at 733." (App. 6a)

The District Court's factual finding on the existence of exigent circumstances will not be disturbed unless clearly erroneous.

> "United States v. Gargotto, 510 F2d 409, 411 (6th Cir. 1974), cert denied, 420 U.S. 987, reh. denied, 423 U.S. 884 (1975)" (App. 6a)

> "The record here reveals no exigency sufficient to justify the warrantless entry of the home and arrest of Morgan. None of the traditional exceptions justifying abandonment of the warrant procedure are present here." (App. 7a)

Question 2 would seem to turn on whether the arrest occurred before or after Respondent had emerged from the house. If the arrest occurred while Respondent was inside the house and before he opened the door in response to the coercive action of the officers, then the weapon held by Respondent and immediately seized constituted fruit of the improper arrest according to well settled law. United States v. Williams, 604 F.2d 1102, 1123 (8th Cir. 1979); United States v. Cisneros, 448 F.2d 298, 303 n.6 (9th Cir. 1971).

The Circuit Court of Appeals found evidence from the District Court hearing, to fully support the position that the "detention" or apprehension" of the Respondent, both constituting facets of an arrest, occurred before Respondent opened the door to his dwelling. (App. 11a, 12a supra and authorities cited).

Question 3 of the Petition would call for the Court to extend recent modifications to the Fourth Amendment exclusionary rule even further so as to eliminate the need for the officers to appear before a magistrate. Question 3 further assumes the officers had (i) a reasonable belief that they could not obtain a search warrant from any of the three nearby magistrates and (ii) a reasonable belief that the warrantless arrest did not violate the Fourth Amendment.

The plain facts available from the evidentiary record, as found by the Court of Appeals, refutes the above assumptions.

> "During the one-to two-hour period between Sheriff Reynolds' first observation of Morgan at Potter Falls and Morgan's subsequent arrest, no effort was made by any law enforcement agency to obtain a search or arrest warrant. When asked at the suppression hearing why he did not obtain a warrant from one of the judges available on the weekend, Chief Alcorn stated: "Well, generally-we have tried to, on several occasions, to contact the judges on the weekend and either one of the judges are hard to reach on the weekend." (App. 5a)

The absence of exigent circumstances as reflected by the officer's testimony further reflects the unreasonableness of their harsh manner of intrusion. (See App. 9a supra)

Under the circumstances of the subject case, the Court of Appeals properly relied on Payton vs. New York, 445 U.S. 573 (1980) as well as the other authorities cited in its opinion.

CONCLUSION

The Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

Counsel for Respondent